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SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 942

R. M. VAUGHN AND WIFE,
MILLIE LOU VAUGHN, *Petitioners*,

v.

CONTINENTAL ROYALTY COMPANY.

REPLY BRIEF
to
PETITION FOR WRIT OF CERTIORARI

STOREY, SANDERS, SHERRILL
& ARMSTRONG,
ROBERT GERALD STOREY,
Counsel for Respondent,
Continental Royalty Company.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Concurrent Findings of Fact by District Court and Circuit Court

The following are Findings of Fact made concurrently by the United States District Court and by the Circuit Court of Appeals, which Respondent deems vital in any disposition of this cause, and which the Re-

spondent submits, under the rules and construction thereof, can be accepted as final by this Honorable Court.

(1) The parties to the deed complained of knew what land was intended to be conveyed and acted on that knowledge. (Opinion—Circuit Court of Appeals, paragraph No. 1, at page 73.—116 Federal (2d) 72.)

(2) The Petitioners bought under deed, and seek to deraign title solely under that deed, as against this Respondent, which deed to the Petitioners contained as a portion of its description the same alleged defective reference on which they rely exclusively for relief as against this Respondent, to wit, reference to deed recorded in "Volume 36, page 434," Deed Records of Titus County, Texas (Transcript of Record, page 81), and which is the same reference as made in deed to this Respondent, and which is attacked by the Petitioners. (Petition for Writ of Certiorari, page 2.)—(Paragraph No. 3, page 74, 116 Federal (2d).)

(3) "* * * the consideration for the 101 acre tract was *fully paid to and accepted by McPeters," the Respondent's vendor, and the party under whom Petitioners claim* and on whose remedy, if any, the Petitioners must rely. (Paragraphs 4 and 5, page 74, Opinion.)

(4) The instant suit was filed July 3, 1936 (Transcript of Record, page 5), after Respondent had been holding since March 30, 1921, by deed regular on its face, and executed, acknowledged and delivered by Pe-

titioners' predecessors (first paragraph, Opinion, page 73, 116 Federal (2d), which deed had been duly filed for record on the 5th day of April, 1921, and recorded on the 13th day of May, 1921, in the Deed Records of Titus County, Texas, in Volume 50, page 27 (Transcript of Record, page 36); and the vendee, Continental Royalty Company, Respondent herein, has been claiming under same since that date.

Argument

The case of *Smith v. Sorelle*, cited and relied upon by Petitioners, is distinguishable from the instant case on three material points.

FIRST, the contract attacked in that case was dated February 5, 1931, and the complaining party, seeking to set aside deed dated February 11, 1931, supposed to have been executed in pursuance of such contract, promptly and diligently attacked both the contract and the deed by suit filed on May 13, 1931; whereas in the instant case, no complaint was made for more than fifteen years after the execution of the deed and the filing and recording of same.

SECOND, there was allegation and evidence in the Sorelle case that the consideration agreed upon had never been paid, and that the deed was in the hands of the Defendant "without consideration and * * * in violation of the terms of contract * * *"; whereas in the instant case, the conclusive findings of fact show

consideration wholly paid by the Respondent to its vendors, and no attack directly or indirectly ever made upon that basis, the evidence showing that the original vendors accepted the consideration and retained it without ever offering to return, or complaining in any manner.

THIRD, in the case cited by Petitioners, the descriptive reference attacked was not aided by the doctrine of *idem sonans*, the reference being to deed by a person, neither of whose initials was correct, and therefore the doctrine of *idem sonans* was not available; whereas in the instant case, the sole technicality complained of, in the face of both of the lower Courts' conclusive findings, was as to a two page mistake or oversight as to reference, there being no question that the deed, referred to for aid, was actually present in the volume of the Deed Records referred to, and only two pages removed from the page named.

Respondent respectfully suggests that the cited case of *Smith v. Sorelle* by Petitioner can not be fully understood without reading the Opinion in the same case in the Court of Civil Appeals in cause entitled *Busby et al v. Smith et al*, 53 S. W. (2d) 138.

Petitioners make quotation on page 11 of their Petition without showing the source thereof, though at first glance it might appear to be a quotation from Judge Silbley's dissenting opinion. Accordingly, since such quotation is not from Judge Sibley's dissenting opin-

ion, and the source thereof is not disclosed, Respondent does not answer.

The Petitioners seek Writ under Rule 38 of this Honorable Court upon allegation that the Circuit Court of Appeals has decided an important question of law in a way probably in conflict with applicable local decisions.

In view of the above quoted concurrent findings of the District Court and the Circuit Court of Appeals and their finality herein, no conflicts exist when examined in the light of the facts in the cases relied upon by Petitioner.

The Respondent can not amplify, in view of the foregoing, on the Opinion and the cases cited by Judge Hutcheson in the majority opinion in the instant case, to which reference is hereby made. To cite from the cases would be surplusage at this time. Suffice it to say that Respondent insists that they fully support the decisions on the various points as reached by Judge Hutcheson.

In passing, however, Respondent would call this Honorable Court's attention to the fact that under the statutory action of Trespass to Try Title in Texas, the Petitioner can never recover upon infirmity of his adversary's title, but only upon Petitioners' proved superior title. *Salinas v. Jones*, 60 Federal (2d) 1049; *Hillman v. Meyer*, 35 Texas 461; *Kirby Lumber Company v. Conn*, 263 S. W. 902.

In the instant case, the same alleged defect appears in the title to Petitioners that appears in the deed to Respondent in that the deed to Petitioners contains the same description, in part, by reference to "Volume 36, page 434," that is contained in the deed herein complained of.

We also direct the Honorable Court's attention to the fact that Texas has four primary adverse possession statutes pertaining to the titles to land, to wit: three years (Article 5507, Revised Civil Statutes of Texas, 1925, as amended); five years (Article 5509, Revised Civil Statutes of Texas, 1925, as amended); ten years (Article 5510, Revised Civil Statutes of Texas, 1925, as amended); and twenty-five years (Article 5519, Revised Civil Statutes of Texas, 1925, as amended).

The Respondent stresses the particularly obvious fact herein, which is that the Petitioners' position is entirely technical, in that no question has been raised as to any fraud, or any defect in execution, acknowledgment and delivery. The consideration between the Petitioners' predecessors and the Respondent was openly and fairly arrived at and paid to and accepted by the vendors, who themselves never made any complaint. The suit herein is an attempt by alleged technicality to deprive the Respondent of its property for which it paid a fair consideration, and in a transaction with which all parties thereto were apparently satisfied, and

of which no complaint was made for more than fifteen years.

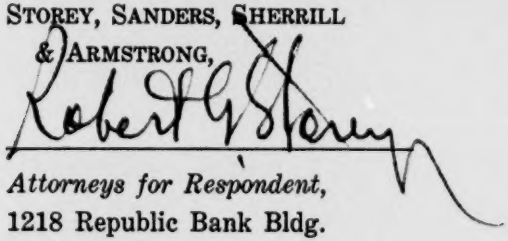
There has been no miscarriage of justice in this case.

Conclusion

Respondent respectfully suggests that upon an analysis of the facts found, the decisions cited by Judge Hutcheson and the distinctions evident from an analysis of facts present in the instant case as contra-distinguished from those in the Petitioners' cases, the ground for jurisdiction of this Honorable Court, relied upon by Petitioners, does not exist, and that the Petition for Writ of Certorari should be dismissed.

Respectfully submitted,

STOREY, SANDERS, SHERRILL & ARMSTRONG,



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